

## ANTITRUST LAW: CASE DEVELOPMENT AND LITIGATION STRATEGY

LW.11043.001  
NYU School of Law  
Spring 2019

Mondays, 4:10-6:00 pm  
FH 316  
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### Week 5: The Private Cause of Action (Unit 4)

In the next three classes we will examine the antitrust private cause of action. We will use the *Boyle* complaint to organize our discussion, so be sure to bring a copy to class.

After a brief examination of the role of private litigation in the scheme of U.S. antitrust enforcement, we will turn to the high-level requirements for a bringing a private cause of action:

1. A *private right of action*, which enables the plaintiff to bring the case to the court for adjudication (Clayton Act §§ 4(a), 16).
2. *Subject matter jurisdiction*, which gives the court the power to adjudicate the subject matter of the dispute (28 U.S.C. §§ 1331, 1337).
3. *Personal jurisdiction* over the defendant, which empowers the adjudicating court to bind the defendant to the judgment (28 U.S.C. § 1391; Clayton Act §§ 4(a), 16, 22).<sup>1</sup>
4. The rules of *venue*, which determine in which federal district court (forum) the case may be brought and adjudicated.

The Unit 4 class notes through slide 39 will be helpful in guiding you through these introductory topics.

*Commencing civil actions.* With these broad requirements of subject matter jurisdiction, private right of action, personal jurisdiction, and venue in mind, we will dissect the *Boyle* complaint (Unit 4 pp. 8-16). *Boyle* is the first of many follow-on private actions against the members of the Indianapolis ready-mix price-fixing conspiracy. It represents a garden variety private antitrust price-fixing complaint for treble damages and injunctive relief. Please read it carefully (and bring a copy to class). That said, do not concern yourself with the paragraphs containing the class action allegations, since we will cover those in detail when we start the class action unit in Week 7.

As you read the *Boyle* complaint, ask yourself paragraph by paragraph (or sentence by sentence) why the plaintiffs included it. Review Federal Rules of Civil Procedure (FRCP) 2, 3, 7, 8, 10, and 11 to get a sense of the general rules of pleading (pp. 17-21). Pay particular attention to Rule 11—it plays a critical role in all federal private actions and we will discuss it in some detail in class.

*The private cause of action.* Paragraph 4 of the *Boyle* complaint invokes the Clayton Act's private cause of action for treble damages under Section 4 and for injunctive relief under Section 16. Read the private cause of action section in the required reading (pp. 23-40) and the associated class notes (slides 3-13). This section will also introduce the three key features of private antitrust treble damages litigation: treble damages, joint and several liability, and no right of contribution.

*Subject matter jurisdiction and the reach of the Sherman Act.* Paragraph 5 of the *Boyle* complaint alleges the grounds for the court's subject matter jurisdiction. We are going to look at subject matter jurisdiction broadly in three parts:

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<sup>1</sup> As a quick aside, personal jurisdiction over the plaintiff is essentially automatic, since the plaintiff's appearance in court upon the filing of its complaint gives the court jurisdiction over the plaintiff.

1. The constitutional authority for the federal government to regulate anticompetitive conduct through the antitrust laws.
2. The constitutional authority for the federal courts to adjudicate generally cases arising under the federal antitrust laws (this is what Paragraph 5 addresses).
3. The constitutional authority of a court to adjudicate the particular antitrust case before it.

These topics are addressed in the subject matter jurisdiction section in the reading materials (pp. 42-51) and the associated class notes (slides 12-21). When reading Paragraph 5 of the complaint, be sure that you know the role of each of the four statutory provisions cited in the paragraph.

Also, we will briefly discuss the almost unintelligible Section 6a of the Sherman Act, better known as the Foreign Trade Antitrust Improvements Act or FTAIA. Good luck trying to parse it. It is some of the worse drafted legislative language I have ever seen. You can find it on page 52 of the required reading.<sup>2</sup> Hopefully, the notes in the required reading will be helpful (pp. 52-55).

*Personal jurisdiction and venue.* Personal jurisdiction is not explicitly addressed in the *Boyle* complaint, but Paragraph 6 of the complaint covers the closely related topic of venue. We will talk about both personal jurisdiction and venue in the context of Paragraph 6. Try to understand the role of each of the cited statutes in Paragraph 6. My suggestion is to skim the statutes (pp. 57-59), then read the class notes on slides 25-40 carefully, and then go back and read the statutes again. After that, read the *Microsemi* case (pp. 60-71), which hopefully will help pull things together. This is a complicated area of the law, especially for those who have not studied personal jurisdiction and venue in civil procedure or federal courts. But do not obsess over these materials—we will cover what you need to know in class.

We will be lucky if we can cover all of this material on Monday. But we have a lot of material to cover in three weeks, so I encourage you to do all of the reading.

As always, send me an email if you have any questions.

Dale

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<sup>2</sup> For anyone who is interested, Unit 26 on [AppliedAntitrust.com](http://AppliedAntitrust.com) has more materials and cases on extraterritoriality.